

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CHAO KANG LIN,

Petitioner,

V.

UNITED STATES OF AMERICA,

## Respondent.

CASE NO. C05-660RSM  
(CR01-158RSM)

## ORDER DENYING CERTIFICATE OF APPEALABILITY

On January 17, 2006, petitioner filed a Notice of Appeal, which was construed by the Court as a petition for Certificate of Appealability. 28 U.S.C. § 2253. To obtain such a certificate and proceed with an appeal of the denial of a petition for habeas corpus, the petitioner must make a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make such a showing, petitioner “must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are ‘adequate to deserve encouragement to proceed further.’” *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983) (citations omitted).

As petitioner has submitted no separate statement of issues for appeal, the Court has reviewed his objections to the Report and Recommendations (“R&R”) issued in his case. That R&R recommended the denial of petitioner’s § 2255 motion for relief from his sentence based

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on the Supreme Court's decisions in *Blakely v. Washington*, 124 S. Ct. 2531 (2004) and *United States v. Booker*, 125 S. Ct. 738 (2005), because neither of those cases apply retroactively. (Dkt. #13 at 4). The R&R also recommended the denial of petitioner's motion based on ineffective assistance of counsel, finding that petitioner failed to meet the standard for relief on that basis. The Court adopted the R&R, simply noting that, the Ninth Circuit Court of Appeals had recently held that *Blakely* – and therefore *Booker* – does not apply retroactively to cases on collateral review, and therefore, Judge Benton correctly determined that petitioner may not rely upon *Booker* in support of his motion to vacate. (Dkt. #17).

The Court finds that reasonable jurists would find no debatable issue here. The Ninth Circuit Court of Appeals has made clear that *Blakely* and therefore *Booker* do not apply retroactively, and this Court is bound by that determination. The Ninth Circuit has also made clear that an *Apprendi* argument in this case would have been futile, and therefore, counsel's failure to preserve such an argument does not constitute ineffective assistance of counsel. Accordingly, the Court finds that petitioner has failed to make a substantial showing of a denial of a constitutional right, and his petition for Certificate of Appealability is DENIED. *See* 28 U.S.C. § 2253(c)(2).

The Clerk shall forward a copy of this Order to petitioner and all counsel of record.

DATED this 7 day of February 2006.



RICARDO S. MARTINEZ  
UNITED STATES DISTRICT JUDGE